

**AHM Advisors v Litwin**

2012 NY Slip Op 33050(U)

November 29, 2012

Sup Ct, New York County

Docket Number: 810112/2012

Judge: Eileen A. Rakower

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: \_\_\_\_\_  
*Justice*

PART 15

Index Number : 810112/2012  
AHM ADVISORS, LLC.  
vs.  
LITWIN, ROBERT  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION LETTER**

## FILED

DEC 04 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 11/29/12



\_\_\_\_\_, J.S.C.  
HON. EILEEN A. RAKOWER

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X

AHM ADVISORS,

Index. No. 810112/2012

Plaintiff,

Mot. Seq No.: 001

DECISION AND  
ORDER

-against-

ROBERT LITWIN and "JOHN DOE #1" through  
"JANE DOE #22," the last 22 names being fictitious and  
unknown to plaintiff, the persons or parties intended  
being the tenants, occupants, persons or corporations,  
if any, having or claiming an interest in or lien upon  
the mortgaged premises described in the  
Verified Complaint,

**FILED**

**DEC 04 2012**

NEW YORK  
COUNTY CLERK'S OFFICE

Defendants.

-----X

This action was commenced by plaintiff AHM Advisors, LLC, ("AHM" or "Plaintiff"), as assignee of Flushing Savings Bank-New York Federal Division ("Flushing"), against defendant Robert Litwin ("Litwin") by the filing of a Summons, Verified Complaint and Notice of Pendency on or about July 16, 2012. As set forth in the Summons, Verified Complaint and Notice of Pendency filed with the Clerk of County of New York on July 16, 2012, this is an action to foreclose a commercial mortgage which encumbers two (2) non-contiguous parcels of real property situated in New York County, known as and by 129 West 112<sup>th</sup> Street, New York, NY (Block 1822, Lot 12) and 342 West 123<sup>rd</sup> Street, New York, NY (Block 1949, Lot 153). The foreclosure action was commenced pursuant to the terms of a Mortgage Note dated June 7, 2008 (the "Original Note"), which Mortgage was extended and modified by an Amended and Restated Note (collectively, "the Note") and a first Mortgage dated June 7, 2007 ("the Original Mortgage"), which was extended and modified by Mortgage Modification, Spreader and Security Agreement, also made by Litwin.

Plaintiff's Verified Complaint consists of two causes of action; the first cause of action seeks foreclosure of the subject mortgage and the second seeks reasonable attorneys' fees pursuant to the terms of the Note and Mortgage. Defendant Litwin interposed an Answer dated August 27, 2012.

Presently before the Court is Plaintiff's motion for an Order (a) granting summary judgment as against defendant Litwin; (b) discontinuing against all of the remaining Defendants named in this action and amending the caption of this case accordingly to reflect said discontinuance; and (c) appointing and referring this action to a Referee to compute the damages due to Plaintiff. Plaintiff's motion at bar only seeks summary judgment as to liability, and is requesting that the matter be referred to a Referee to compute the proper extent and amount of damages due to Plaintiff under the Note and Mortgage.

In support of its motion, Plaintiff submits the Affidavit of Avi Dishi, the Managing Member of Plaintiff, and the Affidavit of Regularity of Richard J. Pilson, Esq. As set forth in Dishi's Affidavit and as set forth in the First Cause of Action of the Complaint, on or about June 7, 2007, Defendant Litwin, for the purposes of securing payment for the Original Mortgage Note in the amount of \$775,000, executed, acknowledged, and delivered to Flushing, the Original Mortgage. On or about July 1, 2009, Litwin, for the purpose of extending the term of the Original Note, executed and delivered to Flushing an Amended and Restated Note ("Amended Mortgage Note"). As security for payment of the said Amended Mortgage Note, defendant Litwin executed, acknowledged, and delivered to Flushing a Mortgage Modification, Spreader and Security Agreement made between Litwin and Flushing, which is dated July 1, 2009 and recorded January 19, 2010. The two premises covered by the Original Mortgage are commonly known as 129 West 112<sup>th</sup> Street, New York, NY (Block 1822, Lot 12) and 342 West 123<sup>rd</sup> Street, New York, NY (Block 1949, Lot 153).

Furthermore, as per Dishi's Affidavit, the terms of the Amended and Restated Note provided for the payment of interest only at the rate of seven percent (7%) per annum, with a maturity date of July 1, 2010 whereupon the entire principal sum of \$775,000 together with all accrued and unpaid interest became due and payable.

Defendant Litwin has failed to comply with the terms, covenants, and conditions of the Note and Mortgage by defaulting in the payment of the balloon payment of principal and interest which became due under the Note and Mortgage as of the maturity date of July 1, 2010. The last interest payment was made on June 1, 2010. According to Dishy's Affidavit, "There is now due and owing to the Plaintiff under said Note and Mortgage the sum of \$775,000, with interest thereon, from July 1, 2010, at the default interest rate of sixteen (16%) percent per annum."

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

In mortgage foreclosure actions, it is well settled that a mortgagee makes a *prima facie* showing of entitlement to judgment as a matter of law when it "produce[s] the mortgage documents underlying the transaction and undisputed evidence of nonpayment (*Red Tulip, LLC v. Neiva*, 2007 NY Slip Op 6340, \*5 [1st Dept. 2007]) (citation omitted). Once a mortgagee fulfills its initial burden, it becomes incumbent on the party opposing summary judgment to come forward with competent evidence of any defenses to raise an issue of fact (*see Barcov Holding Corp. v. Bexin Realty Corp.*, 16 A.D.3d 282, 283 [1st Dept. 2005]).

Here, Plaintiff has made its *prima facie* showing of entitlement to summary judgment. Plaintiff has demonstrated that it is the owner and holder of both the subject note and mortgage pursuant to an assignment of the mortgage and allonge to the note. Plaintiff has also annexed copies of the subject note and mortgage documents underlying the subject properties and has submitted proof of nonpayment in the form of Avi Dishy's Affidavit, which states, "Defendant Litwin failed to comply with the terms and provisions of the Note and Mortgage by failing to pay the balloon

payment of \$775,000, which became due on the first day of July 2010, and owes interest thereon at the rate of 16%, according the terms of the Note, for the period thereafter, until said sum is due."

Defendant Litwin does not oppose. As such, Litwin has failed to provide any triable issues to preclude summary judgment.

Wherefore it is hereby

ORDERED that plaintiff AHM Advisors, LLC's motion is granted; and it is further

ORDERED that summary judgment is granted as against defendant Robert Litwin in favor of plaintiff AHM Advisors, LLC, and it is further

ORDERED that the action is discontinued against all of the remaining Defendants in this action; and it is further

ORDERED that the caption be amended by striking therefrom the names of 'JOHN DOE #1' through "JANE DOE #22" such names being fictitious; and all other papers and proceedings heretofore filed herein shall be deemed amended accordingly; and it is further

ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
AHM ADVISORS, LLC,

Plaintiff,

-against-

ROBERT LITWIN,

**FILED**

**DEC 04 2012**

NEW YORK  
COUNTY CLERK'S OFFICE

Index. No. 810112/2012

DECISION AND  
ORDER

Defendant.

-----X

;and it is further

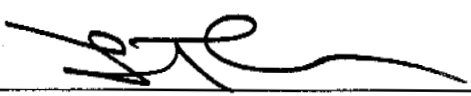
ORDERED that this action be and the same is hereby referred to Susan Baumel-Cornicello, of the law offices of Cornicello, Tendler & Baumel-Cornicello, LLP, 2 Wall Street, 20<sup>th</sup> Floor, New York, NY 10005, Tel: (212) 994-0260, as Referee, to Compute the amount due to the plaintiff, to ascertain and compute the amount due to the plaintiff for principal, interest, and other disbursements advances as provided for in the note and mortgage upon which this action was brought, to examine and report whether or not the mortgaged premises can be sold in parcels, and that the referee make his/her report to the Court with all convenient speed; and it is further

ORDERED that the Referee's hearing be had in the County of New York; and it is further

ORDERED that by accepting this appointment the referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to, section 36.20 (Disqualifications From Appointment), and section 36.2(d) (Limitations on Appointments Based on Compensation); and it is further

ORDERED that plaintiff's attorney serve a conformed copy of this order upon the County Clerk and the Trial Support Office for amendment of their records.

DATED: 11/29/12



\_\_\_\_\_  
EILEEN A. RAKOWER, J.S.C.

**FILED**

**DEC 04 2012**

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